

REPORT

ON

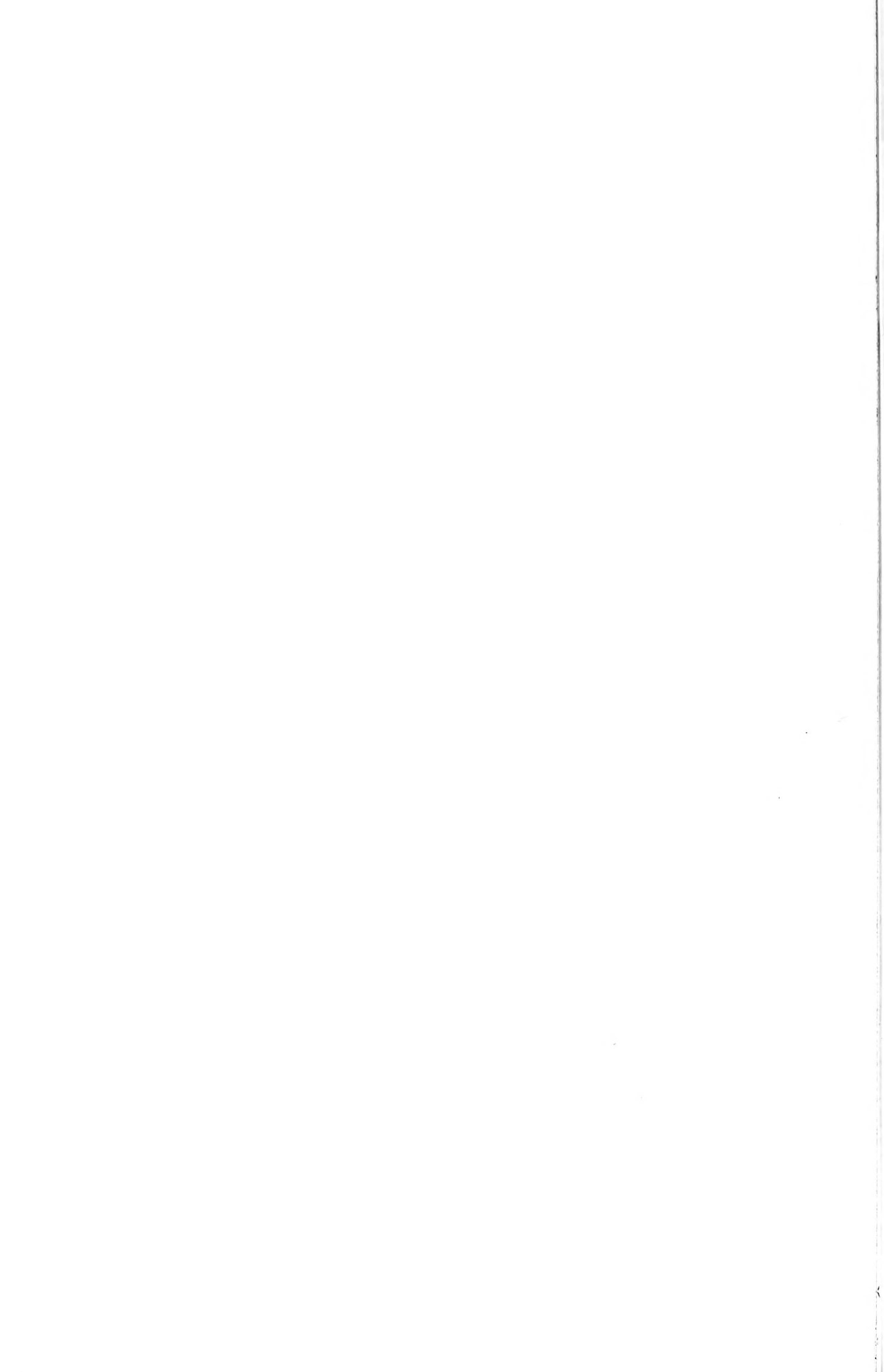
THE BASIS OF LIABILITY FOR PROVINCIAL OFFENCES

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY



Ontario



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ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY



The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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Christine B. Henderson, BA, LLB

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The Commission's office is located on the Eleventh Floor at 720 Bay Street, Toronto, Ontario, Canada, M5G 2K1.

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EXECUTIVE SUMMARY

In its *Report on the Basis of Liability for Provincial Offences*, the Ontario Law Reform Commission recommends fundamental reform of the law relating to the categorization of provincial offences and other related matters. The report comes to the conclusion that the law is deficient in three main respects. First, there is no clear guidance concerning the basis of liability for provincial offences. Ontario legislation does not deal comprehensively with the basic issue concerning the degree of fault, if any, which must be established in order to obtain a conviction for different kinds of offences. Second, absolute liability offences continue to exist under provincial law. Under such offences, a person may be convicted where she has merely committed the physical act, or *actus reus*, of the offence, but has not been at fault. Finally, the Commission believes that the burden of proof in respect of provincial offences ought to be examined both as a matter of principle and in light of the *Canadian Charter of Rights and Freedoms*.

The Commission recommends the abolition of absolute liability offences under provincial law. The Commission is of the view that it is wrong in principle to convict a person merely for committing the prohibited physical act, where the defendant has not engaged in morally blameworthy conduct. The Commission takes the position that legal responsibility for any provincial offence, however minor, should be based on some notion of fault.

The Commission also proposes the enactment of a new statutory regime to deal comprehensively with the basis of liability for provincial offences. This new legislation would strike a more appropriate balance between fairness to the individual and the essential law enforcement requirements of the community at large. Strict liability, or negligence, would constitute the minimum requirement of fault for all provincial offences, unless the Legislature expressly uses language connoting *mens rea*. In a strict liability offence, the standard is objective and is based on the conduct of the reasonable person in similar circumstances. *Mens rea*, on the other hand, is subjective and refers to fault based on an aware state of mind, such as intention, knowledge, recklessness or wilful blindness respecting the circumstances and/or consequences of the offence.

Although under the Commission's proposals strict liability would constitute the minimum standard, the Commission makes the important recommendation that before an accused can be imprisoned for committing a provincial offence, either an aware state of mind or a marked and substantial departure from the conduct of a reasonable person in similar circumstances must be alleged and proved by the prosecution.

With respect to the burden of proof, the report recommends that, for *mens rea* and strict liability offences, the prosecution should continue to be required to establish beyond reasonable doubt that the defendant committed the physical act of the offence. In addition, for *mens rea* offences, the prosecution must prove beyond a reasonable doubt that the defendant committed the physical act with an aware state of mind. For strict liability offences, there would be a presumption that the defendant's conduct was not that of a reasonable person in similar circumstances. However, the defendant could not be convicted where some evidence is led to show that he took reasonable care to avoid the commission of the offence. Where such evidence of conduct capable of amounting to reasonable care has been adduced, thereby rebutting the presumption, in order to secure a conviction the prosecution would be required to establish the defendant's negligence beyond a reasonable doubt.

The Commission also makes proposals on a number of other related matters. The report deals with the sanction for nonpayment of a fine imposed under provincial legislation. It recommends that section 70 of the *Provincial Offences Act* should be amended to ensure that only clearly wilful defaulters are liable to imprisonment for failure to pay a fine. Moreover, it is proposed that, unless it is unreasonable to do so, the fine option program and the civil enforcement procedure under the Act ought to be resorted to before a warrant of committal can be issued.

Finally, the Commission recommends that every rule or principle of the common law, and every provision of the *Criminal Code* as amended from time to time that is not limited to a specific offence, that renders any circumstance a justification or excuse for an act or omission, or a defence to an offence, should be available to a person charged with a provincial offence, except insofar as it is altered by or is inconsistent with any other Act.

The recommendations proposed in the report apply to offences appearing in provincial statutes and regulations, as well as to those imposed under municipal by-laws.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The following recommendations apply to all “provincial offences”, that is, to offences which appear in provincial statutes and regulations and in municipal by-laws.
2. (a) Absolute liability should be abolished for provincial offences. Liability for every provincial offence should be based on some minimum requirement of fault.
 - (b) Every provincial offence should be interpreted as imposing strict liability, unless the Legislature expressly uses language connoting an aware state of mind (*mens rea*), such as “knowingly”, “intentionally”, “recklessly”, “wilfully blind” or other similar words.
 - (c) (i) Before imprisonment can be imposed for a provincial offence, either an aware state of mind or a marked and substantial departure from the conduct of a reasonable person in similar circumstances should be required to be alleged and proved.
 - (ii) Where such a marked and substantial departure has been alleged in a charge, it should continue to be possible to convict the person charged of a lesser included offence, as it now is under section 56 of the *Provincial Offences Act*.
3. (a) The traditional burden of proof in *mens rea* offences should be retained. The prosecution should continue to be required to establish both the physical element and mental element of the offence beyond a reasonable doubt in order to secure a conviction.
 - (b) A mandatory presumption rather than a reverse onus should exist in strict liability offences. In the absence of evidence to the contrary, negligence should be presumed. In a strict liability case, it should be necessary that evidence of conduct capable of amounting to reasonable care be adduced, either by the testimony of the defendant, through the examination or cross-examination of a Crown or defence witness, or in some other way. The defendant should not be obliged to establish that she was not negligent on a balance of probabilities. Where such evidence of reasonable care has been adduced, thereby rebutting the presumption, in order to secure a conviction the prosecution should be required to establish the defendant’s negligence beyond a reasonable doubt.

4. (a) The burden of proof for offences involving conduct for which a licence or other similar regulatory sanction is required should be the same way as for any other provincial offence (see Recommendation 3).
- (b) Section 48(3) of the *Provincial Offences Act* should be repealed.
5. Every rule or principle of the common law, and every provision of the *Criminal Code* as amended from time to time that is not limited to a specific offence, that renders any circumstance a justification or excuse for an act or omission, or a defence to an offence, should be available to a person charged with a provincial offence, except insofar as it is altered by or is inconsistent with any other Act.
6. (a) Section 70 of the *Provincial Offences Act* should be amended to ensure that only clearly wilful defaulters are imprisoned for failure to pay a fine.
- (b) Unless it is unreasonable to do so, the fine option program under section 68 of the *Provincial Offences Act*, and the civil enforcement procedure in section 69, ought to be resorted to before a warrant of committal is issued.

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RAPPORT

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**LE FONDEMENT DE LA RESPONSABILITÉ PÉNALE EN MATIÈRE
D'INFRACTIONS PROVINCIALES**

Commission de réforme du droit de l'Ontario

SOMMAIRE

